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No. 282

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In the Supreme Court of the United States

October Term, 1962

CLEVELAND PROTECTION CREDIT ASSOCIATION, PETITIONER

v.

STANLEY J. BOWLAND, TAX COMMISSIONER OF OHIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

REPLY BRIEF FOR PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 282

COLUMBUS PRODUCTION CREDIT ASSOCIATION, PETITIONER

v.

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REPLY BRIEF FOR PETITIONER

In its Brief in Opposition to the petition for a writ of certiorari, respondent Tax Commissioner of Ohio makes several arguments that deserve some comment, and in the following paragraphs we deal briefly with each of them. Respondent has, we submit, presented no adequate reason for denial of the petition, and we respectfully urge that it be granted.

1. Respondent first argues (Br. Opp. 5–6) that the settled principle that a waiver of the tax immunity of a federal instrumentality must be clear and unambiguous (*Austin* v. *The Aldermen*, 7 Wall. 694, 699) does not apply to this case, because this case involves "statutory exemption" and not "federal immunity." The argument is without substance. In the first

place, petitioner, as a federal instrumentality, has implied immunity from state taxation except to the extent allowed by Congress, see, *e.g.*, *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 477–479; the court below explicitly recognized this fact when it stated that petitioner "has inherent as well as specific statutory exemption from a state franchise tax" (Pet. App. 28). In the second place, respondent suggests no basis—and there is none—for his novel assumption that the principle requiring clarity in waivers of federal tax immunity is somehow less applicable to express statutory immunity than it is to judicially implied immunity; it would seem that, if anything, the contrary would be the case.

2. Respondent goes on to argue (Br. Opp. 6–8) that because petitioner voluntarily pays an Ohio tax on intangible property, it has in effect conceded that the waiver of tax immunity in the last sentence of Section 63 of the Farm Credit Act of 1933, 48 Stat. 267, as amended, 12 U.S.C. 1138c (Pet. App. 31), is coextensive with the grant of immunity earlier in that same section. The argument runs thus: if the omission of the words "their franchises" (which appear in the Section 63 *exemption*) from the Section 63 *waiver* means that the waiver does not extend to franchises, then, by a parity of reasoning, the same must be true with respect to "capital, reserves, [and] surplus" (also included in the exemption and excluded from the waiver); and yet (so the argument runs), petitioner has conceded that this latter is not so by paying a tax on intangibles. The short and

obvious answer to this is, of course, that, irrespective of what the Section 63 waiver may omit,[1] it expressly embraces "property"; the Ohio tax that petitioner pays is a tax on the intangible property of a dealer in intangibles, and is "in lieu of all other taxes on the other property and assets of such * * * dealer" except real estate (Ohio Revised Code, §§ 5725.13, 5725.26). If the waiver with respect to the taxation of petitioner's "property" applies to anything, it applies to this tax. That petitioner willingly pays it, and refrains from attempting to press the statutory exemption beyond what was plainly intended by Congress, should scarcely be held against petitioner as a reason for imposing an additional tax to which the congressional waiver of immunity does not clearly extend.

3. Respondent's discussion (Br. Opp. 8–11) of the legislative history of the Farm Credit Act of 1933 adds nothing; as we have previously noted (Pet. 10,

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[1] We suggest that respondent's easy equation of the "intangible property" on which petitioner unprotestingly pays taxes and the "capital, reserves, [and] surplus" exempted from taxation by Section 63 is unsound. Lest there be any question, petitioner does not concede that States may, under Section 63, tax the capital, reserves and surplus of production credit associations in which all of the class A stock held by the government has been retired; we note that the taxing authorities of at least two States have ruled that the taxes of those States on "corporate excess" are not applicable to such production credit associations because they would be on "capital," contrary to the terms of Section 63 (January 14, 1949, letter opinion of Francis M. Hill, Director, Massachusetts Division of Corporation Taxes; January 25, 1949, letter opinion of Harold W. James, Deputy Tax Administrator, Rhode Island Department of Finance).

n. 7), references to the tax immunity provision therein were mere paraphrases from which no valid conclusion can be drawn. We challenge respondent's assertion that "petitioner is a government instrumentality only in the sense * * * that it operates under the laws of the government which chartered it" (Br. Opp. 10–11) and that the supervision of the Governor of the Farm Credit Administration over petitioner is no different from the supervision of a state corporation commission over all corporations chartered by the State (Br. Opp. 11). Petitioner is a federal instrumentality because Congress expressly declared it to be such in Section 63 of the Farm Credit Act of 1933, *supra;* and the supervision over petitioner by the Governor provided for by Congress (see Pet. 3–4) is, we submit, far more pervasive than, and of an entirely different character from, that of state corporation commissions over ordinary state-chartered corporations. In any event, we question the relevance of this branch of respondent's argument; it is not the Governor's continuing supervision over petitioner even after the government's class A stock has been retired that calls for liberal construction of petitioner's tax exemption—it is the continuing interest of the federal government in securing credit for farmers at the lowest possible cost, an interest that does not terminate simply because a particular association may have reached a state of self-sufficiency whereby government capital is no longer needed.

4. While his argument is not altogether clear on this point, respondent seems to argue (Br. Opp. 11–12) that rulings by the tax authorities of other States

referred to by petitioner (Pet. 13, 37) may not actually be in conflict with the decision of the Supreme Court of Ohio because (1) the tax in question may not have been one to which production credit associations were in any event amenable, and (2) the ruling may not have been based on Section 63 of the Farm Credit Act of 1933, *supra*. We do not consider the existence, *vel non*, of such a conflict to be sufficiently critical to the merits of the petition to justify setting forth the full text of each of the opinions in question; moreover, since most of the opinions were based on written or oral submissions by representatives of the federal farm credit system, in some cases the opinion itself may not fully reflect the reasoning behind it. Suffice it to set forth one of these opinions in the margin[2] as clear evidence that

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[2] [letterhead omitted]

9 December 1948.

Subject: State Taxation of Franchise Granted by Federal Government.

Mr. Frank P. McGowan
General Counsel
Farm Credit Administration of Columbia
Columbia, South Carolina

DEAR MR. MCGOWAN: Reference is made to your letter of December 1, 1948, in which you state that certain of the production credit associations organized in North Carolina under the Farm Credit Act (12 U.S.C. 1131, et seq.) are considering retiring all stock held by the Production Credit Corporation [now the Governor of the Farm Credit Administration].

It is the opinion of this office that even after this step has been taken the production credit associations so acting in North Carolina will not be subject to the North Carolina corporation franchise tax. The last sentence of Section 63 of the Farm Credit Act, providing that only the property and income of an association lose their immunity from State taxation after

a direct conflict does exist among state taxing authorities with respect to the question presented herein.

5. Respondent notes (Br. Opp. 12–13) that, if the decision below stands, there will be no direct financial burden on the federal government. Petitioner has never contended otherwise. As petitioner has shown (Pet. 14)[2], the burden of the decision below, and any other like it that may be rendered in the future, will fall upon the federal farm credit system as a whole

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the retirement of all stock owned by the Production Credit Corporation, is in conformity with the general rule that a State cannot lawfully do anything to impair or cripple franchises, rights, and privileges derived from the United States. *California* v. *Central P.R. Co.*, 127 U.S. 1; *United States* v. *Arredondo*, 6 Pet. (U.S.) 691. This rule has been consistently followed and it is significant to note that attempts to tax Federal franchises have been uniformly held invalid, regardless of the ownership of the corporation or the nature of the business. For a review of the authorities see: Stoke, *State Taxation and the New Federal Instrumentalities*, 22 Iowa Law Review, 39. Cf. *Leggett* v. *Bank*, 204 N.C. 151, 167 S.E. 557 (1933).

Yours very truly,

HARRY MCMULLAN,
Attorney General [of North Carolina]
(S) J. E. Tucker,
JAMES E. TUCKER,
Assistant Attorney General

[2] We take this occasion to correct an error in Appendix E to the petition (p. 36) and of a statement on p. 14 of the petition based upon the appendix. The estimated annual franchise tax for the State of Washington should be $10,922.00 instead of $462.00; the understatement resulted from a computation on a net instead of a gross income basis. This would change the total estimated annual franchise tax appearing at the bottom of Appendix E and at p. 14 to $388,150.00. (Source: Farm Credit Administration, Washington, D.C., 1962.)

and will operate to the detriment of that system's basic purpose of bringing the farmers of the Nation credit for agricultural purposes at the lowest possible cost.

Respectfully submitted.

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